

CHAPTER Soil 200 PRACTICE AND PROCEDURE

PART Soil 201 PURPOSE AND SCOPE

Soil 201.01 Purpose and Scope. The board shall conduct various proceedings for the purpose of acquiring sufficient information to make fair and reasoned decisions on matters within its statutory jurisdiction, including decisions on applications for certification and complaints filed against certificate holders and others in the practice of soil and wetland science. These rules are intended to secure the just, efficient and accurate resolution of all board proceedings.

PART Soil 202 DEFINITIONS

Soil 202.01 Purpose and Scope.

(a) "Appearance" means a written notification to the board that a party or a party's representative intends to actively participate in a hearing.

(b) "Hearing" means "adjudicative proceeding" as defined by RSA 541-A:1, I, namely, "the procedure to be followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A:36."

(c) "Motion" means a request to the presiding officer for an order or ruling directing some act to be done in favor of the party making the motion, including a statement of justification or reasons for the request.

(d) "Natural person" means a human being.

(e) "Party" means "party" as defined by RSA 541-A:1, XII, namely, "each person or board named or admitted as a party, or properly seeking and entitled as a right to be admitted as a party." The term "party" includes all intervenors in a proceeding, subject to any limitations established pursuant to RSA 541-A:33, III.

(f) "Person" means "person" as defined by RSA 541-A:1, XIII, namely, "any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than a board."

(g) "Presiding officer" means presiding officer as defined in RSA 541-A:1, XIV, namely, "that individual to whom the board has delegated the authority to preside over a proceeding, if any; otherwise it shall mean the head of the board."

(h) "Proof by a preponderance of the evidence" means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not to be true.

PART Soil 203 PRESIDING OFFICER; WITHDRAWAL AND WAIVER OF RULES

Soil 203.01 Presiding Officer; Appointment; Authority.

(a) All hearings shall be conducted for the board by a natural person appointed or authorized to serve as a presiding officer.

(b) A presiding officer shall as necessary:

(1) Regulate and control the course of a hearing;

(2) Facilitate an informal resolution acceptable to all parties;

- (3) Administer oaths and affirmations;
- (4) Receive relevant evidence at hearings and exclude irrelevant, immaterial or unduly repetitious evidence;
- (5) Rule on procedural requests, including adjournments or postponements, at the request of a party or on the presiding officer's own motion;
- (6) Question any witness to develop a complete record;
- (7) Cause a complete record of any hearing to be made, as specified in RSA 541-A:31, VI; and
- (8) Take any other action consistent with applicable statutes, rules and case law necessary to conduct the hearing and complete the record in a fair and timely manner.

Soil 203.02 Withdrawal of Presiding Officer.

(a) Upon his or her own initiative or upon the motion of any party, a presiding officer or board official shall, for good cause withdraw from any hearing.

(b) Good cause shall exist if a presiding officer or board official:

- (1) Has a direct interest in the outcome of a proceeding, including, but not limited to, a financial or family relationship;
- (2) Has made statements or engaged in behavior which objectively demonstrates that he or she has prejudged the facts of a case;
- (3) Personally believes that he or she cannot fairly judge the facts of a case; or

(c) Mere knowledge of the issues, the parties or any witness shall not constitute good cause for withdrawal.

Soil 203.03 Waiver or Suspension of Rules by Presiding Officer. The presiding officer, upon his or her own initiative or upon the motion of any party, shall suspend or waive any requirement or limitation imposed by this chapter upon reasonable notice to affected persons when the proposed waiver or suspension appears to be lawful, and would be more likely to promote the fair, accurate and efficient resolution of issues pending before the board than would adherence to a particular rule or procedure.

PART Soil 204 FILING, FORMAT AND DELIVERY OF DOCUMENTS

Soil 204.01 Date of Issuance or Filing. All documents governed by these rules shall be rebuttably presumed to have been issued on the date noted on the document and to have been filed with the board on the actual date of receipt by the board, as evidenced by a date stamp placed on the document by the board in the normal course of business.

Soil 204.02 Format of Documents.

(a) All correspondence, pleadings, motions or other documents filed under these rules shall:

- (1) Include the title and docket number of the proceeding, if known;

(2) Be typewritten or clearly printed on durable paper 8 1/2 by 11 inches in size;

(3) Be signed by the party or proponent of the document, or, if the party appears by a representative, by the representative; and

(4) Include a statement certifying that a copy of the document has been delivered to all parties to the proceeding in compliance with Soil 204.03.

(b) A party or representative's signature on a document filed with the board shall constitute certification that:

(1) The signer has read the document;

(2) The signer is authorized to file it;

(3) To the best of the signer's knowledge, information and belief there are good and sufficient grounds to support it; and

(4) The document has not been filed for purposes of delay.

Soil 204.03 Delivery of Documents.

(a) Copies of all petitions, motions, exhibits, memoranda, or other documents filed by any party to a proceeding governed by these rules shall be delivered by that party to all other parties to the proceeding.

(b) All notices, orders, decisions or other documents issued by the presiding officer or board shall be delivered to all parties to the proceeding.

(c) Delivery of all documents relating to a proceeding shall be made by personal delivery or by depositing a copy of the document, by first class mail, postage prepaid, in the United States mail, addressed to the last address given to the board by the party or if represented to the party's representative.

(d) When a party appears by a representative, delivery of a document to the party's representative at the address stated on the appearance filed by the representative shall constitute delivery to the party.

PART Soil 205 TIME PERIODS

Soil 205.01 Computation of Time.

(a) Unless otherwise specified, all time periods referenced in this chapter shall be calendar days.

(b) Computation of any period of time referred to in these rules shall begin with the day after the action which sets the time period in motion, and shall include the last day of the period so computed.

(c) If the last day of the period so computed falls on a Saturday, Sunday or legal holiday, then the time period shall be extended to include the first business day following the Saturday, Sunday or legal holiday.

PART Soil 206 MOTIONS AND PLEADINGS

Soil 206.01 Motions; Objections.

(a) Motions shall be in written form and filed with the presiding officer, unless made in response to a matter asserted for the first time at a hearing or on the basis of information which was not received in time to prepare a written motion.

(b) Oral motions and any oral objection to such motions shall be recorded in full in the record of the hearing. If the presiding officer finds that the motion requires additional information in order to be fully and fairly considered, the presiding officer shall order the moving party to submit the motion in writing, with supporting information within 5 days of the order. Objections to such motions shall be filed within 5 days of the filing of the motion.

(c) Objections to written motions shall be filed within 30 days of the date of the motion;

(d) Failure by an opposing party to object to a motion shall not in and of itself constitute grounds for granting the motion.

(e) The presiding officer shall rule upon a motion after full consideration of all objections and other factors relevant to the motion.

Soil 206.02 Pleadings.

(a) The only pleadings permitted shall be petitions, other than for rulemaking, and replies to petitions. Applications shall not be considered pleadings.

(b) All petitions shall contain:

- (1) The name and address of the petitioner;
- (2) The name and address of the petitioner's representative, if any;
- (3) A concise statement of the facts that caused the petitioner to request the board to act;
- (4) The action that the petitioner wishes the board to take; and
- (5) The identification of any statutes, rules, orders, or other authority that entitles the petitioner to request the board to act.

(c) Board replies to petitions shall contain:

- (1) The name and address of the petitioner;
- (2) The name and address of the representative of the petitioner, if any;
- (3) A statement addressing each fact alleged in the petition;
- (4) A statement addressing the authority identified by the petitioner;

- (5) A concise response to each statement;
- (6) The identification of any statutes, rules, orders, or other authority, not identified in the petition, having a bearing upon the subject matter of the petition; and
- (7) The action the board took.

(d) Replies shall be filed within 90 days from the date of the petition.

PART Soil 207 NOTICE OF HEARING; APPEARANCES; PRE-HEARING CONFERENCES

Soil 207.01 Commencement of Hearing. A hearing shall be commenced by an order of the board giving notice to the parties at least 30 days prior to the hearing as required by Soil 207.03.

Soil 207.02 Docket Numbers. A docket number shall be assigned to each matter to be heard which shall appear on the notice of hearing and all subsequent orders or decisions of the board.

Soil 207.03 Notice of Hearing.

(a) A notice of a hearing issued by the board at least 30 days prior to the hearing and shall contain the information required by RSA 541-A:31, III, namely:

- (1) A statement of the time, place and nature of any hearing;
- (2) A statement of the legal authority under which a hearing is to be held;
- (3) A reference to the particular statutes and rules involved including this chapter;
- (4) A short and plain statement of the issues presented;
- (5) A statement that each party has the right to have an attorney represent them at their own expense; and
- (6) A statement that each party has the right to have the board provide a certified shorthand court reporter at the party's expense and that any such request shall be submitted in writing at least 10 days prior to the hearing.

Soil 207.04 Appearances and Representation.

(a) A party or the party's representative shall file an appearance that includes the following information:

- (1) A brief identification of the matter;
- (2) A statement as to whether or not the representative is an attorney; and
- (3) The party or representative's daytime address and telephone number.

Soil 207.05 Prehearing Conference. Any party may request, or the presiding officer shall schedule on his or her own initiative, a pre-hearing conference in accordance with RSA 541-:31V to consider:

- (a) Offers of settlement;
- (b) Simplification of the issues;
- (c) Stipulations or admissions as to issues of fact or proof by consent of the parties;
- (d) Limitations on the number of witnesses;
- (e) Changes to standard procedures desired during the hearing by consent of the parties;
- (f) Consolidation of examination of witnesses; and
- (g) Any other matters which aid in the disposition of the proceeding.

PART Soil 208 ROLES OF BOARD STAFF AND COMPLAINANTS

Soil 208.01 Role of Board Staff in Enforcement or Disciplinary Hearings. Unless called as witnesses, board staff as defined in Soil 103.04 shall have no role in any enforcement or disciplinary hearing.

Soil 208.02 Role of Complainants in Enforcement or Disciplinary Hearings. Unless called as a witness or granted party or intervenor status, a person who initiates an adjudicative proceeding by complaining to the board about the conduct of person who becomes a party shall have no role in any enforcement or disciplinary hearing.

PART Soil 209 INTERVENTION

Soil 209.01 Intervention.

(a) A non-party may intervene in a matter pending before the board under the provisions of RSA 541-A:32, by filing a motion stating facts demonstrating that the non-party's rights or other substantial interests might be affected by the proceeding or that the non-party qualifies as an intervenor under any provision of law.

(b) If the presiding officer determines that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the hearing, he or she shall grant the motion for intervention.

(c) Participation by intervenors shall be limited to that which is necessary to protect the interest identified in the petition for intervention.

(d) Petitions for intervention shall be filed any time after commencement of a proceeding, and state:

- (1) The petitioner's interest in the subject matter of the hearing;
- (2) Whether the petitioner appears in support of the complainant, or the respondent, as well as for his or her own interest;
- (3) Why the interests of the parties and the orderly and prompt conduct of the proceeding would not be impaired; and

(4) Any other reasons why the petitioner should be permitted to intervene.

(e) A person filing a complaint that becomes the subject of a disciplinary hearing shall be served with the hearing notice and notified of the right to intervene in the proceeding.

(f) Once granted leave to intervene, an intervenor shall take the proceeding as he or she find it and no portion of the proceeding shall be repeated because of the fact of intervention.

PART Soil 210 POSTPONEMENT REQUESTS AND FAILURE TO ATTEND HEARING

Soil 210.01 Postponements.

(a) Any party to a hearing may make an oral or written motion that a hearing be postponed to a later date or time.

(b) If a postponement is requested by a party to the hearing, it shall be granted if the presiding officer determines that good cause has been demonstrated. Good cause shall include the unavailability of parties, witnesses or attorneys necessary to conduct the hearing, the likelihood that a hearing will not be necessary because the parties have reached a settlement or any other circumstances that demonstrate that a postponement would assist in resolving the case fairly.

(c) If the later date, time and place are known at the time of the hearing that is being postponed, the date, time and place shall be stated on the record. If the later date, time and place are not known at the time of the hearing that is being postponed, the presiding officer shall issue a written scheduling order stating the date, time and place of the postponed hearing as soon as practicable.

Soil 210.02 Failure to Attend Hearing. If any party to whom notice has been given in accordance with Soil 207.03 fails to attend a hearing, the presiding officer shall declare that party to be in default and either:

(a) Dismiss the case, if the party with the burden of proof fails to appear; or

(b) Hear the testimony and receive the evidence offered by a party, if that party has the burden of proof in the case.

PART Soil 211 REQUESTS FOR INFORMATION OR DOCUMENTS

Soil 211.01 Voluntary Production of Information.

(a) Each party shall attempt in good faith to completely and timely respond to requests for the voluntary production of information or documents relevant to the hearing.

(b) When a dispute between parties arises concerning a request for the voluntary production of information or documents, any party may file a motion to compel the production of the requested information under Soil 211.02.

Soil 211.02 Motions to Compel Production of Information.

(a) Any party may make a motion requesting that the presiding officer order the parties to comply with information requests. The motion shall be filed at least 15 days before the date scheduled for the hearing, or as soon as possible after receiving the notice of hearing.

(b) The moving party's motion shall:

(1) Set forth in detail those factors which it believes justify its request for information; and

(2) List with specificity the information it is seeking to discover.

(c) When a party has demonstrated that such requests for information are necessary for a full and fair presentation of the evidence at the hearing, the presiding officer shall grant the motion.

Soil 211.03 Mandatory Pre-Hearing Disclosure of Witnesses and Exhibits. At least 5 days before the hearing the parties shall exchange a list of all witnesses to be called at the hearing with a brief summary of their testimony, a list of all documents or exhibits to be offered as evidence at the hearing, and a copy of each document or exhibit.

PART Soil 212 RECORD, PROOF, EVIDENCE AND DECISIONS

Soil 212.01 Record of the Hearing.

(a) The board shall record the hearing by tape recording or other method that will provide a verbatim record except for a proceeding on emergency action shall be governed by RSA 541-A:30, III.

(b) If any person requests a transcript of the taped record, the board shall cause a transcript to be prepared and, upon receipt of payment for the cost of the transcription, shall provide copies of the transcript to the requesting party.

(c) At the request of a party to any proceeding involving disciplinary action, the record of the proceeding shall be made by a certified shorthand court reporter provided by the board at the requesting party's expense. A request for a certified shorthand court reporter shall be filed at least 10 days prior to the hearing.

Soil 212.02 Standard and Burden of Proof. The party asserting a proposition shall bear the burden of proving the truth of the proposition by a preponderance of the evidence.

Soil 212.03 Testimony; Order of Proceeding.

(a) Any person offering testimony, evidence or arguments shall state for the record his or her name, and role in the proceeding. If the person is representing another person, the person being represented shall also be identified.

(b) Testimony shall be offered in the following order:

(1) The party or parties bearing the burden of proof and such witnesses as the party may call;

- (2) The party or parties opposing the party who bears the overall burden of proof and such witnesses as the party may call.

Soil 212.04 Evidence.

- (a) Receipt of evidence shall be governed by the provisions of RSA 541-A:33.
- (b) All documents, materials and objects offered as exhibits shall be admitted into evidence unless excluded by the presiding officer as irrelevant, immaterial, unduly repetitious or legally privileged.
- (c) All objections to the admissibility of evidence shall be stated as early as possible in the hearing, but not later than the time when the evidence is offered.
- (d) Transcripts of testimony and documents or other materials, admitted into evidence shall be public records unless the presiding officer determines that all or part of a transcript or document is exempt from disclosure under RSA 91-A:5 or applicable case law.

Soil 212.05 Proposed Findings of Fact and Conclusions of Law.

- (a) Any party may submit proposed findings of fact and conclusions of law to the presiding officer prior to or at the hearing.
- (b) Upon request of any party, or if the presiding officer determines that proposed findings of fact and conclusions of law would serve to clarify the issues presented at the hearing, the presiding officer shall specify a date after the hearing for the submission of proposed findings of fact and conclusions of law.
- (c) In any case where proposed findings of fact and conclusions of law are submitted, the decision shall include rulings on the proposals.

Soil 212.06 Closing the Record.

- (a) After the conclusion of the hearing, the record shall be closed and no other evidence shall be received into the record, except as allowed by paragraphs (b) of this section and Soil 212.08.
- (b) Before the conclusion of the hearing, a party may request that the record be left open to allow the filing of specified evidence not available at the hearing. If the other parties to the hearing have no objection or if the presiding officer determines that such evidence is necessary to a full consideration of the issues raised at the hearing, the presiding officer shall keep the record open for the period of time necessary for the party to file the evidence and for cross examination on such evidence.

Soil 212.07 Reopening the Record. At any time prior to the issuance of the decision on the merits, the presiding officer, on the presiding officer's own initiative or on the motion of any party, shall reopen the record to receive relevant, material and non-duplicative testimony, evidence or arguments not previously received, if the presiding officer determines that such testimony, evidence or arguments are necessary to a full and fair consideration of the issues to be decided.

Soil 212.08 Decisions.

(a) A board member shall not participate in making a decision unless he or she personally heard the testimony in the case, unless the matter's disposition does not depend on the credibility of any witness and the record provides a reasonable basis for evaluating the testimony.

(b) If a presiding officer has been delegated the authority to conduct a hearing in the absence of a majority of the officials of the board who are to render a final decision, the presiding officer shall submit to the board a written proposal for decision, which shall contain a statement of the reasons for the decision and findings of fact and rulings of law necessary to the proposed decision.

(c) If a proposal for decision in a matter not personally heard by the board is adverse to a party to the proceeding other than the board itself, the board shall serve a copy of the proposal for decision on each party to the proceeding and provide an opportunity to file exceptions and present briefs and oral arguments to the board.

(d) A proposal for decision shall become a final decision upon its approval by the board.

(e) The board shall keep a decision on file in its records for at least 5 years following the date of the final decision or the date of the decision on any appeal, unless the director of the division of records management and archives of the department of state sets a different retention period pursuant to rules adopted under RSA 5:40.

PART Soil 213 MOTION FOR REHEARING

Soil 213.01 Purpose. The rules in this part are intended to supplement any statutory provisions, including RSA 541, that require or allow a person to request a rehearing of a decision of the board prior to appealing the decision.

Soil 213.02 Applicability. The rules in this part shall apply whenever any person has a right under applicable law to request a rehearing of a decision prior to filing an appeal of the decision with the court having appellate jurisdiction.

Soil 213.03 Filing and Content of Motion.

(a) The motion for rehearing shall be filed within 30 days of the date of the board decision or order.

(b) A motion for rehearing shall:

- (1) Identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered;
- (2) Describe how each error causes the board's decision to be unlawful, unjust or unreasonable, or illegal in respect to jurisdiction, authority or observance of the law, an abuse of discretion, or arbitrary, unreasonable or capricious;
- (3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and
- (4) Include any argument or memorandum of law the moving party wishes to file.

Soil 213.04 Standard for Granting Motion for Rehearing. A motion for rehearing in a case subject to appeal under RSA 541 shall be granted if it demonstrates that the board's decision is unlawful, unjust or unreasonable.

Soil 213.05 Decision on Motion for Rehearing. The board shall grant or deny a motion for rehearing, or suspend the order or decision pending further consideration within 10 days of the filing of the motion for rehearing.

PART Soil 214 RULEMAKING PUBLIC COMMENT HEARINGS

Soil 214.01 Purpose. The purpose of this part is to provide a uniform procedure for the conduct of public hearings at which comment from the general public will be solicited for evaluation and consideration by the board relative to rulemaking.

Soil 214.02 Scope.

(a) These rules shall apply to all hearings required by state law to be conducted by the board at which public comment shall be solicited, except that they shall not apply to adjudicative hearings.

(b) If any requirement set by these rules conflicts with an applicable statute such other authority shall control.

Soil 214.03 Notice.

(a) A public comment hearing concerning rulemaking shall be commenced by placing notice of the hearing in the "Rulemaking Register" so that it shall appear at least 20 days prior to the hearing date.

(b) Notice for rulemaking public comment hearings shall comply with RSA 541-A:6, I.

(c) Nothing in these rules shall prohibit the board from giving greater notice than the minimums set out in this part.

Soil 214.04 Media Access.

(a) Public comment hearings shall be open to the print and electronic media.

(b) The moderator shall place limits on the activities of the media to avoid disruption in the following ways:

(1) Limiting the number of media representatives when their presence is disproportionate to the number of citizens present and shall cause citizens to be excluded;

(2) Limiting the placement of television cameras to certain locations in the hearing room; and

(3) Prohibiting interviews from being conducted within the hearing room during the hearing.

Soil 214.05 Moderator.

(a) The hearing shall be presided over by a moderator who shall be the board chairperson or a designee.

(b) The moderator shall:

- (1) Call the hearing to order;
- (2) Cause a recording of the hearing to be made;
- (3) Place limits on the media to avoid disruption as set out in Soil 214.04(b);
- (4) Recognize those who wish to be heard and establish the order thereof;
- (5) Limit the time for each speaker, as set out in Soil 214.06(b);
- (6) Remove or have removed any person who disrupts the hearing;
- (7) Adjourn the hearing; and
- (8) Provide opportunity for the submission of written comments.

Soil 214.06 Public Participation.

(a) Any person who wishes to speak on the issue or issues which are the subject of the hearing shall place his or her name and address on a speakers' list before the last speaker on the list has finished speaking. All whose names appear on the speakers' list, as provided, shall be afforded reasonable time to speak at the hearing. Reasonable time shall be determined considering the number of people who wish to be heard, the time and the availability of the facility.

(b) The board, through the moderator, shall:

- (1) Refuse to recognize a person who refuses to give his or her full name and address;
- (2) When a group or organization wishes to comment, limit the group to no more than 3 spokespersons, provided that the members who are present shall be allowed to enter their names and addresses into the record as supporting the position by the group or organization;
- (3) Revoke recognition of a speaker who speaks or acts in an abusive or disruptive manner; or
- (4) Revoke recognition of a speaker who refuses to keep his or her comments relevant to the issue or issues which are the subject of the hearing.

(c) Written comments may be submitted any time from the time notice has been published until the record has been closed by the moderator, which shall not be less than 7 calendar days after the hearing.

(d) In the event that the number of speakers who wish to give oral testimony relevant to the issue or issues involved exceed that number which can be heard within a reasonable period of time subject to facility availability and length of the hearing, the hearing shall be reconvened pursuant to applicable provisions in RSA 541-A to afford such persons the opportunity to be heard. Speakers may elect to submit written testimony in lieu of additional oral hearing.

PART Soil 215 PETITION FOR RULEMAKING

Soil 215.01 Petition for Rulemaking.

(a) Any person may request the board to commence a proceeding for the purpose of adopting, amending, or repealing a rule by filing a written petition that contains:

- (1) The text of the proposed rule or a statement of the particular results intended by the petitioner to flow from the implementation of the proposed rule;
- (2) An identification of the particular rule sought to be amended or repealed;
- (3) Any data or argument the petitioner believes would be useful to the board in deciding whether to commence a rulemaking proceeding; and
- (4) Name, address, signature of petitioner and date signed.

Soil 215.02 Disposition of Petition.

(a) The board shall consider all petitions for rulemaking and proceed pursuant to RSA 541-A:4. The board shall request additional data or argument from the petitioner or other

interested persons to clarify the merits of the petition.

(b) The board shall grant the petition if the petition is consistent with statute and case law and will assist the board with the regulation of the profession.

PART Soil 216 DECLARATORY RULINGS

Soil 216.01 Petitions.

(a) Any person may request a declaratory ruling from the board on matters within its jurisdiction by filing an original and 5 copies of a petition pursuant to Soil 206.02(b).

(b) A petition for declaratory ruling shall set forth the following information:

- (1) The exact ruling being requested; and
- (2) The statutory and factual basis for ruling, including any supporting affidavits or memoranda of a law.

Soil 216.02 Action on Petitions.

(a) The petitioner shall provide such further information or participate in such evidentiary or other proceedings as the board shall direct after reviewing the petition and any replies received.

(b) Upon review and consideration, the board shall within 90 days rule on the petition pursuant to Soil 206.02(d).

PART Soil 217 EXPLANATION AFTER ADOPTION

Soil 217.01 Explanation After Adoption.

(a) Any person may request an explanation regarding adoption of the rules pursuant to RSA 541-A:11, VII by submitting a request to the board.

(b) The request shall be considered at the next scheduled board meeting and the board shall issue a response within 45 days after consideration.